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17

18 **UNITED STATES DISTRICT COURT**  
19 **NORTHERN DISTRICT OF CALIFORNIA**  
20 **SAN FRANCISCO DIVISION**

21

22 LIFESCAN SCOTLAND, LTD.,  
23 Plaintiff,  
24 v.  
25 SHASTA TECHNOLOGIES, LLC,  
26 INSTACARE CORP., PHARMATECH  
27 SOLUTIONS, INC., and CONDUCTIVE  
28 TECHNOLOGIES, INC.,  
Defendants.

Case No. **CV11-04494-MEJ**

**NOTICE OF MOTION, MOTION AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR EXPEDITED DISCOVERY  
AND TO MODIFY THE SCHEDULING  
ORDER**

Date: November 10, 2011  
Time: 10 a.m.  
Place: Courtroom B  
Judge: Hon. Maria-Elena James

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## **NOTICE OF MOTION AND MOTION**

PLEASE TAKE NOTICE, that on November 10, 2011 at 10:00 a.m., or as soon as this matter may be heard, before the Honorable Maria-Elena James, at the United District Court for the Northern District of California, San Francisco Courthouse, Courtroom B - 15th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiff LifeScan Scotland, Ltd. (“LifeScan Scotland”) will move the Court for an Order permitting discovery in advance of the Rule 26(f) conference and to modify the scheduling order under Federal Rule of Civil Procedure 26(d) and Northern District of California Patent Local Rule 3.

LifeScan Scotland seeks expedited discovery in order to determine definitively which of its patents are infringed, consequently expediting any potential amendment of its complaint, facilitating a comprehensive case management conference, and allowing it to comply fully with its disclosure obligations under Northern District of California Patent Local Rule 3.

This motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Roberta H. Vespremi in support of Plaintiff's Motion for Expedited Discovery and to Modify the Scheduling Order, the pleadings and papers filed herein, and upon such other matters as may be presented to the Court at the time of hearing.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

LifeScan Scotland moves this Court to allow it to take limited expedited discovery of defendants Shasta Technologies, LLC (“Shasta”), InstaCare Corp. (“InstaCare”), PharmaTech Solutions, Inc. (“PharmaTech”) and Conductive Technologies, Inc. (“Conductive”) (collectively “Defendants”) regarding products that Defendants intend to introduce imminently both outside the United States and/or within the United States, the manufacture of which would infringe LifeScan Scotland’s patents. LifeScan Scotland has repeatedly attempted to obtain this information from Defendants without resorting to judicial intervention, but Defendants have repeatedly refused to produce the requested information. LifeScan Scotland needs the requested information to comply with its obligations under this Court’s patent rules regarding infringement

1 contentions. Because the requests are narrowly tailored, the production of the requested materials  
2 will not prejudice Defendants.

3 Accordingly, LifeScan Scotland requests an order requiring the Defendants to produce:  
4 (i) samples of the glucose test strips that they are preparing to introduce in the United States,  
5 (ii) documents relating to the manufacture and design of their test strips and (iii) documents  
6 relating to dealings between the Defendants. The requested discovery would allow LifeScan  
7 Scotland to assess the extent to which Defendants' soon-to-be-released products will infringe  
8 LifeScan Scotland's intellectual property rights before the Defendants' products become  
9 entrenched in the marketplace.

10 Further, because the requested product samples and documents are necessary for LifeScan  
11 Scotland to fully comply with this Court's Patent Rules 3-1 and 3-2, and because an analysis of  
12 the samples and documents could lead LifeScan Scotland to narrow the issues and/or assert  
13 additional patents against Defendants, LifeScan Scotland also requests that the Case Management  
14 Conference be adjourned to a date no earlier than 90 days from the receipt of the requested  
15 discovery.

16 **FACTUAL BACKGROUND**

17 **A. The Relevant Technology**

18 LifeScan Scotland commenced this case on September 10, 2011. In this case, LifeScan  
19 Scotland accuses Defendants of infringing LifeScan Scotland's U.S. Patent Nos. 5,708,247 (the  
20 '247 patent) and 6,241,862 (the '862 patent). The inventions at issue involve methods for  
21 manufacturing disposable blood glucose testing strips that are used by persons who suffer from  
22 diabetes. LifeScan, Inc. ("LifeScan") which is the indirect parent of LifeScan Scotland, markets  
23 OneTouch® Ultra® glucose monitoring systems. OneTouch Ultra glucose monitoring systems  
24 are the leader in the worldwide market for glucose monitoring systems; they practice the patents  
25 that are asserted in this case.

26 Glucose monitoring systems, such as the OneTouch Ultra system, are used by diabetics to  
27 check their blood glucose levels. Testing blood glucose levels is one of the most important things  
28 that diabetics can do to ensure their health and to prevent long term complications. Testing

1 allows the person to see what his blood glucose level is and assists in the planning of meals and  
 2 activities. In addition, blood glucose testing is useful to detect either hypoglycemia (low blood  
 3 glucose) or hyperglycemia (high blood glucose); which if left untreated can lead to life-  
 4 threatening complications.

5       Many diabetics use blood glucose meters to measure their blood glucose levels. LifeScan  
 6 Scotland and its affiliates make and sell such a system, the OneTouch series of products. In using  
 7 the OneTouch system, a single use, disposable test strip is placed in the OneTouch meter. A  
 8 sample of blood is placed on the strip in a designated location. Based on careful calibrations, the  
 9 meter is able to determine the blood glucose level in the sample by measuring the flow of  
 10 electrical current. Properly using the OneTouch system, the person may determine if his or her  
 11 blood glucose level is within a satisfactory range or if some treatment is required to increase or  
 12 decrease the level.

13       Several different companies make different blood glucose monitoring systems. However,  
 14 LifeScan Scotland and its affiliates have not authorized any other company to make or sell a test  
 15 strip for use in the OneTouch system.

16 **B. LifeScan Scotland's Futile Attempts to Obtain Information from the Defendants**

17       The Complaint alleges that Defendants' manufacture of the "Shasta Genstrip" glucose test  
 18 strip infringes the '247 and '862 patents. It is believed that Defendants' Shasta Genstrip test  
 19 strips are designed to work with LifeScan's OneTouch meters (D.E. 1 at ¶ 23).

20       The Complaint describes the events that lead LifeScan Scotland to believe that Defendants  
 21 intend to or do infringe LifeScan Scotland's patents and the steps that LifeScan has taken in an  
 22 effort to obtain the information sought by this motion without burdening the Court. As described  
 23 in the Complaint (D.E. 1 at ¶¶ 28-30), on April 18, 2011, InstaCare issued a press release about an  
 24 agreement between the InstaCare subsidiary PharmaTech and Shasta regarding a product known  
 25 as the "Shasta Genstrip." (D.E. 1 at Ex. C.) The press release states that the Shasta Genstrip is  
 26 "targeted at an existing, FDA-approved platform for in-home diabetes testing, the market leader  
 27 in the \$20 billion worldwide market." (*Id.*) This statement plainly refers to LifeScan's market  
 28 leading OneTouch platform. The press release further states that Defendants will "market

1 Genstrip using strategies and tactics similar to the generic drug industry as we *exploit* the  
 2 established diagnostic platform.” (*Id.* (emphasis added).) It also reveals Defendants’ intention to  
 3 take advantage of the “considerable resources” that the platform manufacturer (*i.e.*, LifeScan)  
 4 expended to enter the market by distributing a “much-lower cost consumable.” (*Id.*)

5 On May 24, 2011, InstaCare issued a Financial Guidance Memo for its shareholders.  
 6 (D.E. 1 at Ex. F.) The Memo states that InstaCare forecasts sales at \$41.8 million between July  
 7 and December of 2011 and sales at \$206.6 million in 2012. It further explains that InstaCare  
 8 believes it will garner “as much as \$600 million (5%) of the U.S. glucose monitoring market  
 9 within a few years, beyond the 2011-2012 forecasts already cited.” (*Id.*) And, it announces that  
 10 InstaCare has “[w]orldwide distribution rights” and “[c]omplete control of the Genstrip diabetes  
 11 diagnostic product including regulatory responsibility with the U.S. FDA, Medicare and  
 12 Medicaid, and in Europe CE Mark responsibility.” (*Id.*)

13 Based on this and other information, LifeScan and LifeScan Scotland became concerned  
 14 that Defendants were about to launch the Shasta Genstrip, and that Defendants were likely  
 15 infringing or about to infringe LifeScan Scotland’s patents. During the summer of 2011, LifeScan  
 16 repeatedly wrote to Defendants, requesting the product samples and documents that are the  
 17 subject of this motion. Defendants refused to provide the information requested.

18 On June 24, 2011, LifeScan sent a letter to InstaCare with copies to Shasta and  
 19 Conductive expressing LifeScan’s belief that the Defendants’ activities constitute infringement of  
 20 various LifeScan and LifeScan Scotland patents. (D.E. 1 at Ex. D.) The Shasta Genstrip was not  
 21 yet on the market, and therefore LifeScan and LifeScan Scotland could not purchase the Shasta  
 22 Genstrip in order to perform tests to determine if the Shasta Genstrip would infringe their patents.  
 23 Therefore, LifeScan requested that InstaCare provide it with fifteen samples of each model of the  
 24 Shasta Genstrip along with documents sufficient to describe each step involved in the products'  
 25 manufacture. (*Id.*)

26 By letter dated July 1, 2011 (D.E. 1 at Ex. E), InstaCare and PharmaTech asserted, through  
 27 counsel, that they “do[] not possess the information [LifeScan is] seeking.” (*Id.*) This response  
 28 was directly contrary to the statements in InstaCare’s Financial Guidance Memo, which indicated

1 that InstaCare had “[c]omplete control of the Genstrip diagnostic product inducing regulatory  
 2 responsibility with the U.S. FDA.” (D.E. 1 at Ex. F.)

3 The July 1, 2011 letter was evasive on other topics as well. For instance, rather than  
 4 denying or confirming that the Shasta Genstrips were designed for use with the OneTouch meter,  
 5 InstaCare and PharmaTech simply indicated that they have never made any “public statements  
 6 concerning the use of the Genstrip product with LifeScan meters.” (D.E. 1 at Ex. E.) Further, the  
 7 letter stated that “[t]he Shasta Genstrip has not yet received approval from the Food and Drug  
 8 Administration. Until such time as approval is received, the Genstrip will not be manufactured  
 9 for sale.” (*Id.*) This was, however, contrary to InstaCare’s statement in the Financial Guidance  
 10 Memo predicting sales of over \$40 million in 2011. Finally, InstaCare and PharmaTech wholly  
 11 ignored LifeScan’s request for product samples.

12 LifeScan responded by letter dated July 15, 2011. (D.E. 1 at Ex. G.) To alleviate  
 13 InstaCare’s stated concern about providing information concerning the Shasta Genstrip to “a  
 14 potential competitor,” LifeScan offered to enter into a confidentiality agreement. LifeScan also  
 15 renewed its request for “fifteen samples of each model of the Shasta Genstrip [and] documents  
 16 sufficient to fully describe each step involved in the manufacture of each model of the Shasta  
 17 Genstrip.” (*Id.*) In addition, LifeScan sent a letter directly to Shasta—with copies to InstaCare,  
 18 PharmaTech and Conductive—and requested the same information. (D.E. 1 at Ex. H.)

19 On July 21, 2011, counsel for InstaCare and PharmTech indicated that their position  
 20 remained unchanged. Neither Shasta nor Conductive ever responded to LifeScan’s July 15  
 21 letters. (D.E. 1 at Ex. I.)

22 On September 1, 2011, LifeScan wrote to each of the Defendants and repeated its request  
 23 for manufacturing information and samples. (D.E. 1 at Exs. J, K, L.) LifeScan also informed the  
 24 Defendants that if they continued to remain silent and/or refuse to produce the requested  
 25 information and samples, “the only reasonable inference” is that each of the Defendants recognize  
 26 “that its activities constitute infringement of LifeScan’s patents and that it is attempting to hide  
 27 them.” By September 10, 2011 LifeScan had not received a response from any of the Defendants.  
 28

1           On September 10, 2011, LifeScan Scotland filed this suit.<sup>1</sup> On September 12, LifeScan  
 2 received a letter from counsel for InstaCare and PharmaTech dated September 6 stating that  
 3 InstaCare and PharmaTech did not intend to provide LifeScan with the requested information  
 4 because of “[their] desire to keep [their] ‘trade secrets’ secret.” (Declaration of Roberta H.  
 5 Vespremi (“Vespremi Decl.”), Ex. A.) Also on September 12, LifeScan received a letter from  
 6 Conductive dated September 6, stating that it is “not at liberty to provide samples or information  
 7 relating to any of our customers unless they expressly permit us to do so.” (Vespremi Decl., Ex.  
 8 B.) Notably, Conductive did not deny that it manufactures the Shasta Genstrip, possesses  
 9 information related to that product and has a relationship with InstaCare, PharmaTech and Shasta.  
 10 LifeScan has not still received any response from Shasta.

11           On September 13, 2011, LifeScan again wrote to each of the Defendants and included a  
 12 courtesy copy of the Complaint and again repeated its request for samples of the Shasta Genstrip  
 13 and documents related to its manufacture. (Vespremi Decl., Exs. C, D and E.) Once again,  
 14 neither Shasta nor Conductive responded to LifeScan’s letters and none of the Defendants  
 15 produced any documents or samples.

16           A copy of the Complaint and of this motion were served on Defendants’ registered service  
 17 agents on September 23. (Vespremi Decl. ¶ 3.) Counsel for Defendants have not yet appeared.  
 18 Although Defendants previously have refused to provide the information that is the subject of this  
 19 motion, LifeScan Scotland has not yet been able to confer with Defendants regarding the  
 20 discovery requests contained herein since the filing of this case. Once Defendants appear through  
 21 counsel, LifeScan Scotland will meet and confer with Defendants’ counsel regarding whether  
 22 they will agree to provide the requested documents and product samples on an expedited basis.

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23           <sup>1</sup> Despite not having samples, LifeScan Scotland satisfied its obligations for a pre-suit  
 24 investigation under Fed. R. Civ. P. 11. Because of the difficulty in learning precisely how a  
 25 product is made, the Federal Circuit has held that when asserting a patent claim for a  
 26 manufacturing process—such as the claims that LifeScan Scotland is currently asserting—Rule  
 27 11 is satisfied by reasonable attempts to learn the manufacturing process. *Hoffman-La Roche, Inc. v. Invamed Inc.*, 213 F.3d 1359, 1363-65 (Fed. Cir. 2000). In such circumstances, the party  
 28 can turn to the Court for the use of judicial process and the aid of discovery to learn the actual  
 manufacturing process and determine whether or not there is patent infringement. *Id.* In  
*Hoffman-La Roche*, the Court found that Rule 11 was satisfied when the plaintiff requested the  
 defendant to provide information on the manufacturing process, but the defendants declined to  
 provide that information, which is exactly what Defendants have done in this case.

1 LifeScan Scotland will report to the Court on the outcome of those discussions as soon as  
 2 practicable.

3 Currently, the Rule 26(f) Conference is scheduled for December 22, 2011. Under this  
 4 Court's Patent Rules, LifeScan Scotland's infringement contentions are due fourteen days after  
 5 that. LifeScan Scotland is unable to complete the required infringement contentions without the  
 6 information it requests herein on an expedited basis.

7 **ARGUMENT**

8 Generally, “[a] party may not seek discovery from any source before the parties have  
 9 conferred as required by Rule 26(f), except . . . by court order.” Fed. R. Civ. P. 26(d)(1). This  
 10 Court, and the Ninth Circuit, apply a “good cause” standard in deciding whether to permit  
 11 discovery prior to a Rule 26(f) conference. *Apple Inc. v. Samsung Elec. Co., LTD.*, No. 11-CV-  
 12 01846-LHK, 2011 WL 1938154, at \*1 (N.D. Cal. May 18, 2011) (citing cases). “Good cause  
 13 may be found where the need for expedited discovery, in consideration of the administration of  
 14 justice, outweighs the prejudice to the responding party.” *Id.* (quoting *Semitool, Inc. v. Tokyo*  
 15 *Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002)). Moreover, ““courts have recognized  
 16 that good cause is frequently found in cases involving claims of infringement and unfair  
 17 competition.”” *Apple*, 2011 WL 1938154, at \*2 (quoting *Semitool*, 208 F.R.D. at 276.).

18 In *Semitool*, the plaintiff sought early discovery so that it could determine “which, if any,  
 19 of its other patents are infringed . . . and permit it to comply with its disclosure obligation under  
 20 Northern District of California Patent Local Rule 3.” *Semitool*, 208 F.R.D. at 276. In considering  
 21 whether there was good cause for expedited discovery, this Court considered a variety of factors,  
 22 including, (1) the purpose of the requested early discovery; (2) the breadth of the discovery  
 23 requests; (3) the burden on the defendants to comply with the requests; (4) whether the defendants  
 24 are able to respond to the requests in an expedited manner and (5) how far in advance of the  
 25 typical discovery process the request was made. *See id.* at 276-77. Because the discovery was  
 26 limited in nature, would be produced in the normal course of discovery, had been previously  
 27 asked for and would allow plaintiffs to fully comply with its obligation under Patent Rule 3, this  
 28

1 Court ordered the defendant to produce the requested documents in twenty days. For the same  
2 reasons, LifeScan Scotland requests similar expedited discovery in this case.

3 The first factor considered in *Semitool* (i.e., the purpose of the requested early discovery,  
4 208 F.R.D. at 276-77) weighs in favor of expedited discovery. LifeScan Scotland's request falls  
5 squarely in the exception to Rule 26(d) for cases involving claims of infringement. LifeScan  
6 Scotland is currently asserting method of manufacturing claims against the Defendants. Although  
7 LifeScan Scotland made repeated attempts to learn how the accused Shasta Genstrips are  
8 manufactured, *see pages 3-6, supra*, Defendants refused to provide the product samples and  
9 information requested. LifeScan Scotland needs the requested samples and documents—which  
10 are solely in Defendants' possession and not discoverable from public sources—in order to  
11 comply with Patent Rule 3.

12 In addition, LifeScan Scotland and its indirect parent LifeScan have other patents and  
13 other patent claims directed to glucose monitoring strips. Early production of the requested  
14 documents and product samples will allow LifeScan Scotland and, if appropriate, LifeScan, to  
15 identify any additional patents that will be asserted in this action. Such early information will  
16 allow for an expedited amendment to the Complaint and would provide the ability to identify all  
17 issues before the Court during the Rule 26(f) conference.

18 The second factor considered in *Semitool* (the breadth of the requested discovery, 208  
19 F.R.D. at 276-77) also weighs in favor of expedited discovery. The discovery LifeScan Scotland  
20 requests is limited in scope. Namely, LifeScan Scotland seeks the following:

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1           1.       200 samples of each model of the Shasta Genstrip.

2           2.       Documents sufficient to fully describe the method of manufacture of each

3           model of the Shasta Genstrip.

4           3.       Documents sufficient to show the compatibility of the Shasta Genstrip with

5           the LifeScan OneTouch Ultra line of glucose monitors.

6           4.       All contracts or agreements among any and or all of the Defendants

7           concerning the Shasta Genstrip, including, but not limited to, those described by the April

8           18, 2011 press release identified in paragraph 28 of the Complaint, those described by the

9           May 27, 2011 Financial Guidance Memo identified in paragraph 40 of the Complaint, and

10           those concerning any agreements to manufacture the Shasta Genstrip.<sup>2</sup>

11           These requests are narrowly tailored to the specific issue at hand—to provide LifeScan

12           with specific information that will allow it comply with Patent Rule 3 and to determine if any

13           other patents are infringed. As in *Semitool*, “[t]he request directed to Defendants is narrowly

14           tailored to this benefit. It entails not, e.g., a free ranging deposition for which a

15           representative of Defendants may not have had sufficient time or information with which to

16           prepare, but existing documents and a physical inspection.” 208 F.R.D. at 277. Importantly,

17           these narrow and targeted requests do not seek all relevant documents in Defendants’ possession,

18           custody or control. Instead, LifeScan Scotland only seek documents sufficient to show whether

19           Defendants’ products and manufacturing methods infringe LifeScan Scotland’s patents.

20           The third and fourth factors considered in *Semitool* (*i.e.*, the burden on the defendants and

21           whether they are able to respond in an expedited manner, 208 F.R.D. at 276-77) also weigh in

22           favor of expedited discovery. Early discovery will not unduly burden the Defendants and they

23           certainly are capable of responding to these requests in an expedited manner. Defendants are in

24           sole possession of the requested product samples and documents. The samples and documents

25           provide the information the Defendants need to answer the Complaint and providing that same

26           information to LifeScan Scotland entails no additional burden. In fact, the limited discovery that

27           LifeScan Scotland requests, as in *Semitool* and *Apple*, is “core . . . to the underlying case,” and is

28           information which “w[ould] be produced in the normal course of discovery.” *Semitool*, 208

29           F.R.D. at 276; *see also Apple*, 2011 WL 1938154, at \*2. Because of the narrow scope of the

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2           2 The documents requested in category 4 are necessary for LifeScan Scotland to comply with

3           Patent L. R. 3-1(d) and identify the acts of induced infringement.

1 requested discovery, whatever logistical issues Defendants may encounter in collecting samples  
 2 of products will be minimal, and certainly outweighed by LifeScan Scotland's need for this  
 3 information on an expedited basis.

4 Finally, the fifth factor considered in *Semitool* (how far in advance of the typical discovery  
 5 process the request was made, 208 F.R.D. at 276-77) also weighs in favor of expedited discovery.  
 6 LifeScan's request comes at a reasonable time. In the normal course, LifeScan Scotland would be  
 7 able to serve document requests by December 1, the last date to confer on the discovery plan.  
 8 (D.E. 3.) This request is being made less than two months earlier and is necessary in order to  
 9 ensure production of the responsive documents sufficiently in advance of that December 1 date so  
 10 that the parties can have meaningful discussions on a discovery plan for all of the asserted  
 11 patents. Additionally, the early discovery is necessary for LifeScan Scotland's Patent Rule 3  
 12 submission, due January 5.

13 Here, as in *Semitool*, this Court should order that the requested discovery be provided  
 14 within twenty days instead of the thirty days that is customary under the Federal Rules. 208  
 15 F.R.D. at 277. Although the documents in *Semitool* were located in Japan, the Court was unable  
 16 "to see why given current communication technology, Defendants cannot respond quickly to the  
 17 narrow requests propounded by Plaintiff, especially given that the request hardly comes as a  
 18 surprise and the Case Management Conference and the attendant disclosures are fast  
 19 approaching." *Id.* In this case, the documents are located within the United States and, for the  
 20 most part, are documents that LifeScan has been seeking from Defendants since June 2011.

21 Finally, LifeScan Scotland requests that the date of the Rule 16(b) Conference—currently  
 22 scheduled for December 22, 2011—be moved to a date approximately ninety days after  
 23 Defendants have produced the requested the samples and documents. This will allow LifeScan  
 24 Scotland sufficient time to review the documents and analyze the samples and to determine if it  
 25 needs to amend the Complaint to either add claims asserting additional patents and/or modify the  
 26 patents claims asserted in the Complaint. This adjournment will promote judicial efficiency by  
 27 allowing the parties and the Court to address all the issues at the Conference without the need to  
 28 modify a scheduling order at a late date.

## **CONCLUSION**

For the foregoing reasons, this Court should allow LifeScan Scotland to serve early discovery requests and should order the Defendants to produce the requested product samples and documents within twenty days. Further, the Case Management Conference should be adjourned to a date no earlier than 90 days from the receipt of the requested discovery.

Dated: October 5, 2011

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